

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-1431

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOCKET NO. 74-1431

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UNITED STATES OF AMERICA ex rel.  
ULYSSES BIRT,

Relator-Appellant,

-against-

HON. THEODORE SCHUBIN, Superintendent,  
Ossining Correctional Facility,  
Ossining, New York, et al.,

Respondents-Appellees.

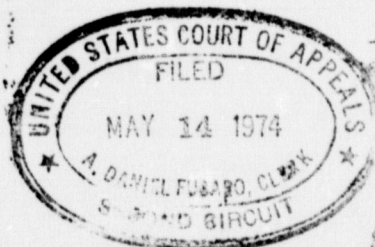
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ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF  
NEW YORK

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BRIEF FOR RELATOR-APPELLANT

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STATEMENT OF QUESTION PRESENTED

May a United States District Court summarily reject a petition for a writ of habeas corpus where the petitioner's conviction was based on an eyewitness identification at trial which was tainted by the use of impermissibly suggestive pretrial photographic identification procedures?

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.	:	
ULYSSES BIRT,	:	
	:	
Relator-Appellant	:	
	:	
-against-	:	Docket No. 74-1431
	:	
HON. THEODORE SCHUBIN, Superinten-	:	
dent, Ossining Correctional	:	
Facility, Ossining, New York, et al.,	:	
	:	
Respondents-Appellees.	:	
	:	

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BRIEF FOR RELATOR-APPELLANT

Preliminary Statement

Ulysses Birt (relator) was incarcerated at the Ossining Correctional Facility, Ossining, New York. He has been on parole since June 26, 1973 and presently resides at 642 Park Place, Brooklyn, New York. Relator appeals from the dismissal by the United States District Court for the Southern District of New York (Ward, J.), without a hearing, of his pro se petition for a writ of habeas corpus. On March 28, 1974 the District Court granted relator's application for a certificate of probable cause. On April 8, 1974 Judge Feinberg appointed counsel to represent relator on this appeal.

Relator was convicted in Supreme Court, Kings County, on August 2, 1971 of robbery in the first degree, grand larceny in the first degree, and possession of a weapon as a felony and was sentenced to a term of imprisonment not to exceed five years. On June 19, 1972, his conviction was affirmed by the Appellate Division, Second Department, of the New York Supreme Court and leave to appeal to the New York Court of Appeals was denied by Chief Judge Fuld on September 8, 1972.

#### Statement of Facts

On January 3, 1969 Constantino Coppola was robbed of approximately \$5,000 (T.37).<sup>\*</sup> The robber wore a ski mask so that Coppola was unable to describe him except that he noted that the robber, a male Negro, wore a heavy winter brown jacket with sheep wool around the collar (T.38-39, 47).

Immediately after the robbery Coppola was able to stop a police car and together they were able to follow the robber in his car (T.42-43). The police lost sight of the car for a short time, but found it again, parked on the corner of Third Avenue and Union Street (T.43-44). The motor was running but the driver had departed leaving the

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\* Reference preceded by "T" refers to the minutes of trial dated March 22, 23, 24, 25, 1971.

stolen money on the floorboard (T.44). In addition to the money, the police discovered various clues in the car including the ski mask (T.45), an envelope addressed to Joanne Birt, 642 Park Place and the vehicle registration certificate (T.132).

Unidentified witnesses informed the police that the suspect had entered a nearby building but a search of the area did not uncover any trace of the robber (T.126). However, another witness, Joseph Nichols, a fourteen year old black youth, stated that he had seen the driver of the car jump out, run across the street, throw an object underneath a car and eventually hitch a ride on a passing truck (T.52-53).

Because of the various clues found in the car, the police went to Birt's home (642 Park Place) later that afternoon (T.134). The apartment was searched in Mrs. Birt's presence and the detectives removed several items from the premises, including two photographs of Birt (T.138).

The police returned to the apartment the next day. At that time Birt was arrested and taken to the station house for questioning and to participate in a lineup (H. 19-20)\* At the lineup, Nichols twice selected Birt as the man he saw leaving the car (T. 101).

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\* References preceded by "H" are to the minutes of the Huntley and Suppression hearings dated March 20, 1971.

On January 28, 1971 the case was moved for trial and a pretrial hearing was conducted concerning the identification of Birt, made by Nichols. At the hearing it was disclosed that Nichols had a long history of involvement with narcotics (W.7-8, 41-2)\*. While Nichols was not using heroin at the time he witnessed the incident, he had used heroin both before and after the incident (W. 8). At the time of trial he was residing in an addict rehabilitation center (W.6-7).

Nichols testified that he saw a blue car racing up Third Avenue (W.9). The car stopped about fifteen feet from him and a man got out (W.11). The man jumped out and ran across the street and threw an object underneath the car and jumped behind it (W.13). After a police car passed the man ran up the block and stopped a truck and got a ride up the block (W.14-15).

Nichols testified that he saw the man's face and he noticed that he was a Negro (W.12). But he didn't notice anything in particular about his face (W.13). He later stated that the man was wearing a light (in weight) summer jacket and corduroy pants (W.27).

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\* References preceded by "W" refer to the minutes of the Wade hearing, dated January 28, 1971.

Nichols also testified about his participation in a lineup the next day. He twice identified Birt as the man he had seen (W.19).

At the end of the hearing the court ruled that the lineup was proper and that Nichols' identification was based on his independent recollection of the incident. (W.85) The court concluded that the identification would, therefore, be admissible in court (W. 86).

At trial, Nichols again identified Birt as the man he had seen. But for the first time, Nichols testified that he had been shown two pictures of Birt prior to the lineup (T. 105).

At the close of the People's case, the defense moved to strike the in-court identification and dismiss the case for failure to establish a prima facie case (T.189). The basis of the argument was that the in-court identification was tainted by the suggestive pretrial showing of the two pictures. Over petitioner's objection, the Wade hearing was reopened (T. 206).

Nichols was recalled and testified that he was not shown any photographs prior to the lineup as he had earlier testified (T.212). He did state that he was shown two photographs of Birt the day of the incident (the day preceding the lineup) (T.212).

Detective Robles was recalled and he continued

to deny having shown any photographs to Nichols prior to the lineup (T.217-218).

The court found that Nichols had in fact been shown two pictures of Birt the day of the incident. However, the court found that there was no suggestive influence practiced upon Nichols either directly or indirectly and that the in-court identification was in no way tainted (T.221-22). Accordingly, the court concluded that the identification was admissible.

#### ARGUMENT

THE ADMISSION OF THE IN-COURT IDENTIFICATION OF RELATOR BY NICHOLS WAS A VIOLATION OF DUE PROCESS BECAUSE THE SHOWING OF TWO PHOTOGRAPHS OF RELATOR TO NICHOLS PRIOR TO THE LINEUP WAS SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

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Despite police denials to the contrary, the trial court found that Nichols, the government's only eyewitness was shown two photographs, both of relator, the day prior to the lineup. Such a pretrial identification procedure is impermissibly and unnecessarily suggestive.

The hazards involving initial identifications of suspects by using only photographs are well known. See P. Wall, Eye-Witness Identifications in Criminal Cases (1965).

As the Supreme Court has stated:

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized . . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. Simmons v. United States, 390 U.S. 377, 383-4 (1968).

Despite these problems the court has not totally prohibited the use of initial identification by photographs. It has noted that in certain cases this procedure may be an effective law enforcement tool from "the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest . . ." Simmons, supra, at 384. However, in the instant case there was little justification for showing the photographs to Nichols and absolutely no justification for displaying only photographs of Birt.

Although Birt had not yet been arrested, it was unnecessary for the police to resort to photographic identification procedures. The clues found in the getaway car so conclusively pointed to Birt that the police searched his residence within two hours of the commission of the crime. Birt was the one and only suspect.

More importantly, if the fact that the suspect had not yet been arrested provided justification for the general use of photographic identification procedures, the situation certainly did not justify the type of procedures employed in this case. The witness went to the police station at the police's request and was then shown two photographs of the same suspect. No effort was made to provide a series of photographs of similar looking individuals.

This court has on a number of occasions found similar procedures to be clearly impermissibly suggestive. "The showing of only two pictures, one of each suspect, to a possible witness and asking her if these are the two men she saw, or if she can identify these two men, is clearly impermissibly suggestive." United States v. Casscles, 489 F.2d 20, 24 (2d Cir. 1973) Accord, United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973).

The preparation of a photographic spread containing pictures of different people is a minor burden for an

investigator when measured against the potential prejudice to the accused. United States v. Workman, 470 F.2d 151, 153 (4th Cir. 1972). There were no extenuating circumstances which might justify not using a less suggestive procedure. United States ex rel. Rivera v. McKendrich, 448 F.2d 30 (2d Cir. 1971), cert denied, 404 U.S. 1025 (1972). The police had sufficient opportunity to prepare a photographic spread even though Birt had not yet been arrested. "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessary suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 198 (1972).

In addition, this court has stated that its willingness to hold an identification method was impermissibly suggestive "would be fortified by the indication of police complicity in arranging an unfair lineup." United States ex rel. Cannon v. Montanye, 486 F.2d 263, 267 (2d Cir. 1973). The police in this case made every effort to suppress information about the suggestive photographic display. In fact, the detective in charge of the investigation, Neilson Robles was severely castigated by the trial court for his handling of the case (T.225-6).

Furthermore, an examination of the circumstances

surrounding this case demonstrates that these suggestive procedures were conducive to irreparable misidentification. Nichols did not have a particularly good nor lengthy opportunity to view the suspect. Nichols only viewed the suspect for a short period of time while the suspect ran across the street. The opportunity for observation was certainly no greater than that found to be inadequate in United States ex rel. Robinson v. Zelker, 468 F.2d 159, 164 (2d Cir. 1972), cert denied, 411 U.S. 939 (1973). When the witness catches "only a fleeting glance of an unknown fleeing felon, the likelihood of misidentification is substantially increased by a suggestive picture spread." United States v. Sutherland, 428 F.2d 1152, 1156 (5th Cir. 1970).

Moreover, his description of the suspect was never very detailed. Nichols never described the suspect's height, weight or general build. He only focused on the suspect's face which supports the contention that he was strongly influenced by the photographs. The following testimony demonstrates the vagueness of Nichols' image of the suspect.

When Nichols was first testifying at the original Wade hearing, he was asked by the court: "Tell us what you saw about the man that you remember?"

THE WITNESS: I saw his face.

THE COURT: And what did you see about his face?

THE WITNESS: That he was a Negro.

THE COURT: Did you notice anything else?

THE WITNESS: The clothes he was wearing."

Later the court asked:

"Did you see -- was there anything in particular about his face?

THE WITNESS: No." (W.12-13)

The description was not only general but also inaccurate. Coppola testified that the robber wore a heavy winter jacket with a sheep wool collar (T.38-39, 47). Nichols testified that the suspect wore a light summer jacket (W. 27). Standing alone, this disparity might not be determinative. But in the instant case, it demonstrates how superficial a view Nichols had of the suspect and how unlikely it was that Nichols had a definite image of the suspect prior to the suggestive photographic display.

Furthermore, not only was Nichols' initial opportunity for identification limited but there was no particular motivation for him to make a careful observation of the perpetrator. Nichols was not the victim of a robbery and he had no reason to suspect that criminal activity was afoot. It is therefore less likely that he would seek

out and retain an image of the suspect. This court has repeatedly stressed the importance of this factor.

United States ex rel. Bisordi v. La Vallee, 461 F.2d 1020, 1024 (2d Cir. 1972); United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir.), cert. denied, 400 U.S. 908 (1970); United States ex rel. Gonzalez v. Zelker, supra.

It is essential to recognize that the susceptibility of a particular witness to suggestive techniques must be taken into account. In United States ex rel. Smiley v. La Vallee, 473 F.2d 682 (2d Cir.), cert. denied, 412 U.S. 952 (1973), this court recognized that the identification procedures were not improper, in part because the witness was an intelligent young social worker. Certainly, the court will not ignore the fact that the witness in this case was a fourteen year old with a long history of involvement with heroin and other drugs. Such an individual is much less likely to resist the implicit suggestions made by the police when they showed him photographs of only one suspect. This factor alone should raise serious doubts about the admissibility of Nichols' subsequent identifications.

Relator contends that the facts in this case establish that his conviction was based on a tainted identification. The photographic display was clearly

suggestive and created a considerable chance that the procedures utilized would lead to a misidentification of the suspect.

It is true that the trial court believed Nichols' testimony that his identification was based on his own independent recollection. But the trial court did not find the identification procedures suggestive and therefore, had no need to especially focus on this issue. More importantly, while Nichols "may have been a credible and convincing witness, his statements alone cannot provide the clear and convincing evidence with which the Government must prove the existence of an independent source. This court has warned against heavy reliance on the reliability of a witness who protests too positively about the source of his identifications, and has held that this testimony must be evaluated in the light of all the circumstances." United States v. Johnson, 452 F.2d 1363, 1369 (D.C. Cir. 1971); Accord, United States v. Evans, 484 F.2d 1178, 1185 (2d Cir. 1973).

It is interesting to note that Nichols was more "confused" about the photographic display than any other aspect of the case. First, he testified that he was not shown any pictures. Then he stated he was shown pictures prior to the lineup. Finally, he stated that he was shown the pictures the day before the lineup. When one takes

into account the fact that Nichols was aware that the police were denying the fact that he was shown the photographs, it is difficult to conclude that he was not significantly influenced by the display. The police attempted to cover up the display and Nichols attempted to first deny its occurrence and then minimize its importance.

This court is not precluded from reviewing the trial court's determinations on this issue.

[T]he determination that evidence of the challenged pre-trial photographic identification is admissible was at best a ruling on a mixed question of law and fact. . . . Whether a pre-trial identification has been conducted in an impermissibly suggestive manner, and, hence is inadmissible is, to be sure, in one sense a question of fact. But it is a question to be determined by applying to a given collection of historical facts a defined legal standard. That defined legal standard is, moreover, a federal standard. Review by a federal habeas corpus court of a determination reflecting the application of a federal legal standard to historical facts is not barred by 28 U.S.C. §2254(d). . . . United States ex rel. Thomas v. New Jersey, 472 F.2d 735, 737-8 (3rd Cir. 1973).

Stovall v. Denno, 388 U.S. 293 (1967) makes clear that federal jurisdiction to make a determination concerning the legality of an identification procedure is not eliminated by 28 U.S.C. §2254(d). Thomas, supra, at 738-9.

This court has the power and the responsibility to determine that the state has not met its burden of proving by clear and convincing evidence that the in-court

identification had an independent origin. While it could be argued that the question of taint will often involve credibility judgments, and the issue is more closely a pure question of fact than a mixed question of fact and law, such arguments have been rejected. Thomas, supra, at 739; United States v. Zeiler, 447 F.2d 993 (3rd Cir. 1971). This court has, inferentially at least, also treated the issue as one calling for the application of federal legal standards to historical facts. United States ex rel. Rivera v. McKendrick, supra; United States ex rel. Robinson v. Zelker, supra. Relator contends that a careful review of the record indicates that the trial court erred in not excluding the tainted testimony and thereby violated relator's constitutional rights. At the very least, if the court is unwilling to grant the petition it should reverse and remand this case for an evidentiary hearing on the issue. United States ex rel. Cannon v. Montanye, supra.

Finally, any error that was committed was harmful since the identification of Birt by Nichols was the only direct evidence linking Birt to the crime. Without Nichols' identification the People would not have established a prima facie case.

Conclusion

The judgment of the district court dismissing relator's petition for a writ of habeas corpus should be reversed and the petition granted. In the alternative the case should be reversed and remanded for an evidentiary hearing on the question of independent source, in accordance with Simmons and its requirements.

Respectfully submitted,

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